

# **Regulatory Enforcement and Sanctions Bill Consultation**

The Office of Fair Trading's response to the  
consultation paper

August 2007

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# 1 INTRODUCTION

- 1.1 OFT supports the draft Regulatory Enforcement and Sanctions Bill as an important step in removing obstacles to delivering a proportionate and effective system of enforcement.
- 1.2 The OFT welcomes the creation of the Local Better Regulation Office (LBRO). We support its core aim, the proposed objective and the five core functions.
- 1.3 The OFT is committed to working in partnership with LBRO to deliver our respective goals and objectives effectively and efficiently. We are equally confident that LBRO will provide valuable assistance to OFT as we provide leadership to help build the capacity of Local Authority Trading Standards Services (TSS) and ensure they take a risk-based, proportionate and coordinated approach to their work; and as we champion the outcomes TSS deliver by acting as a national voice and advocate in government and with other stakeholders.
- 1.4 The OFT welcomes the proposal to create an enabling framework to provide regulators with an expanded toolkit of administrative sanctions. We see this as potentially valuable to the OFT and fellow enforcers in the consumer area. However, the OFT would ideally prefer flexibility in sanctions and have them made available in relation to both criminal offences and civil breaches.

## 2 CONSULTATION QUESTIONS ON THE FORMATION AND OPERATION OF THE LOCAL BETTER REGULATION OFFICE

- 2.1 Question 1: *Do you agree with LBRO's role in helping to facilitate new Primary Authority Partnerships?*
- 2.2 Yes. The OFT has seen the benefits that the home authority relationship can bring to businesses and agrees that they should have access to such relationships wherever practicable. LBRO should be able to play a positive role in improving co-ordination and consistency of regulatory functions and enforcement by facilitating the new Primary Authority Partnerships approach.
- 2.3 We have some concerns about the practicability of the proposals, in particular the ability of some local authorities to resource Primary Authority Partnerships. The consultation document states that LBRO will be able to nominate a local authority to act as a primary authority. In doing so, it must bear in mind any resource issues the authority may have. We are concerned that this does not go far enough. LBRO should have a duty to ensure that adequate resources are available before a local authority is nominated to act as a primary authority, particularly as this would appear to be a new burden and should be treated as such.
- 2.4 Question 2: *Do you agree with the way the Bill handles the communication between primary and enforcing authorities, including the definition of 'enforcement action'? If not, what alternatives do you propose?*
- 2.5 No. Currently under Clause 10 an enforcing authority must consult the primary authority where it considers the business is or may be in breach of any restriction, requirement or condition. The use of these three words doesn't work for consumer protection legislation and so would mean that an enforcer often wouldn't have to consult about action it proposed to take in relation to consumer protection legislation as it won't relate to a restriction, requirement or condition. For instance a trading standards officer may consider that a business is not complying with the Unfair Terms in Consumer Contracts Regulations 1999. There

isn't a requirement to use fair terms, and nor would the business be in breach of a condition or restriction when using unfair terms, but when an enforcer was proposing to take court action the primary authority would want to know about it first.

- 2.6 We understand your policy objective is not to hinder informal action taken and support given to businesses taken to secure compliance with legislation. The OFT is concerned that the current draft of the Bill will not achieve this. The OFT considers that the bar is set too low currently as to what the enforcing authority must consult the primary authority about i.e. the obligation in clause 10 to consult in relation to any action to secure compliance. We consider this will also hamper or prevent legitimate enforcement action and be too burdensome for the primary authority. It would even appear to mean that a trading standards officer would require the consent of a primary authority before using its investigation powers.
- 2.7 We understand that you are considering deleting clause 10(7)(a). We would support this because it was too widely drafted capturing even informal action taken to secure compliance with legislation. We support your attempts to raise the bar generally on what matters an enforcement authority needs to consult a primary authority about. Given the difficulties in defining precisely where the bar should be set we support LACORs' alternative suggestion that where an enforcement authority plans to take any court action it is required by law to seek a statement from a primary authority partnership which would briefly outline the nature of the relationship they have with the business and any advice that had been issued on the issue in question. This would ensure that the enforcer considers its decision from an informed position.
- 2.8 The OFT also has concerns about how the plans fit with Part 8 Enterprise Act 2002. Under s. 214 of the Enterprise Act, an enforcer must consult OFT before applying for an enforcement order and under s. 216, the OFT can direct that another enforcer, including itself takes the case instead, and so can effectively put an end to action if it wishes to. OFT considers that the current situation works well. We have good relationships with our fellow enforcers of Part 8. They often consult us

earlier in the process than they strictly need to and we discuss their proposed action constructively with them. We believe that Part 8 enforcement action should not be part of this regime as we believe we already deliver the policy aim of ensuring only appropriate enforcement action is taken and so to include Part 8 would result in duplication for no apparent benefit.

- 2.9 Ideally the OFT would like Part 8 Enterprise Act 2002 removed from the consent regime. If this option is not chosen then we would support the inclusion of another exemption in clause 10, obviating the need to seek the consent of the primary authority where there is a risk of serious consumer detriment, which necessitates enforcement action being taken without delay.
- 2.10 Question 3: *Do you agree that LBRO should consider every case referred to it by a Primary or Enforcing Authority?*
- 2.11 Yes, but OFT considers that the 28 days LBRO has to issue its findings would be too long in circumstances where an interim injunction or other swift action is necessary and speed of action is of the essence. This would include some consumer protection legislation. For instance in cases where an enforcer wishes to seek an enforcement order, the OFT normally considers the request from an enforcer in less than one working day.
- 2.12 Question 4: *Do you agree that LBRO should be obliged to consider evidence from national bodies when resolving enforcement action disputes?*
- 2.13 Yes. LBRO will not have the expertise to adjudicate upon certain disputes without assistance from national bodies. The OFT welcomes the opportunity to work with LBRO to assist in its understanding issues relating to its area of expertise.
- 2.14 Question 5: *Is the duty to have regard to inspection plans strong enough, or should local authorities be obliged to 'act in accordance with' plans drawn up between a business and a Primary Authority?*

- 2.15 We agree with the intention behind this provision and believe that the requirement to have regard to a national risk assessment and inspection plan drawn up by a Primary Authority should be sufficient. It is for the Primary Authority to act in accordance with its own plan.
- 2.16 Question 6: *(a) Do you agree with this approach? (b) Or should a stronger requirement be placed on local authorities to comply with LBRO guidance? If so, what is your argument?*
- 2.17 Yes, we think it appropriate that local authorities should have a statutory duty to have regard to guidance issued by LBRO. They should have the freedom to depart from it where local circumstances dictate.
- 2.18 We have concerns about LBRO issuing guidance to local authorities on how to enforce specific pieces of legislation or areas of regulation given that LBRO will not have expertise to do so. We would expect LBRO to work with those national bodies which had expertise.
- 2.19 Question 7: *(a) Do you agree with the process set out in the Bill, for evidence gathering and publication? (b) Should LBRO be required in the Bill to consult with specific stakeholder groups?*
- 2.20 Yes. LBRO should be required to adopt an evidence based consultative approach when it reviews the government's regulatory priorities. We agree that it should consult with the same broad range of representative bodies used by Rogers, but precisely which should be a matter for LBRO to decide. The Bill might usefully provide a non-exhaustive list of who, or the type of body which, should be consulted.
- 2.21 LBRO should be required to seek Ministerial consent to the list prior to publication, and it should also publish submissions and evidence received.
- 2.22 Question 8: *Should local authorities be put under a duty to have regard to the list when they plan their own priorities?*
- 2.23 Yes, local authorities should have a duty to have regard to the list when they plan their priorities, but they must retain the flexibility to decide

which of the national priorities are relevant to their particular circumstances. Clause 7(6) does not currently make it clear when local authorities should have regard to the list and this could be usefully clarified.

- 2.24 Question 9: *Do you agree that LBRO should have this advisory role?*
- 2.25 Yes. Close relationships exist between central government departments and local authority regulatory services. Given that these relationships can affect the ability of local authorities effectively and efficiently to deliver their objectives, LBRO needs to be able to provide evidence based advice to central government on relevant issues.
- 2.26 Question 10: *Do you agree with this approach to LBRO's structure and legal powers?*
- 2.27 Yes.
- 2.28 Question 11: *Are there any pieces of legislation on trading standards and environmental health that are enforced by local authorities, and should be added to this list?*
- 2.29 The list does not contain any secondary legislation. Also, some of the legislation will be repealed by the legislation implementing Unfair Commercial Practices Directive 2005/29/EC. The implementing regulations will themselves need to be specified in Schedule 4. Peter Deft at BERR is our policy colleague working on the implementation of that directive and could provide you with further information.
- 2.30 Question 12: *Should anything be removed from this list?*
- 2.31 Please see answer to question 11.
- 2.32 Question 13: *Are there other areas that you believe LBRO's work should extend to, and why?*
- 2.33 The OFT does not have any suggestions for extensions to its work.

- 2.34 Question 14: *To what extent should the Local Better Regulation Office operate across the UK, with respect to the following functions?*
- a) improving co-ordination and consistency*
  - b) guidance to local authorities*
  - c) work on regulatory priorities*
  - d) advice to Government*
  - e) awarding grants*
- 2.35 Please see the answer to Question 15 below.
- 2.36 *Question 15: How should its work be tailored to the different national contexts?*
- 2.37 The OFT believes it is important that the policy goals for LBRO should apply across the UK, for example improving coordination and consistency. How they are achieved in Scotland, Wales and Northern Ireland is for discussion and agreement with the devolved administrations.

#### **Additional matters**

- 2.38 There are some additional matters OFT wishes to respond to which aren't the subject of a question.
- 2.39 We think clause 11 should specify that LBRO should give reasons for its decisions. This would assist all in helping to understand its decisions.
- 2.40 We think the Bill needs to deal with the termination of a primary authority relationship. Unfortunately there will be occasions where the partnership isn't working and the local authority needs the ability to terminate the relationship. There may be others reasons too, for example resources, why this might have to happen.
- 2.41 Although we agree with LBRO's five core functions we are disappointed to see the removal of the Hampton objective that LBRO 'should not compromise regulatory outcomes'. The objective is an important one and should appear on the face of the legislation.

2.42 Given that home authority relationships will continue, we are keen to ensure that businesses will not require both. As currently drafted primary authorities will not have a role in co-ordinating complaints. Home authorities currently act as a focus point for other enforcers to notify them of complaints and then take action if necessary. At workshops on the Bill LATSSs representatives considered that this role was so important that it might be necessary for businesses to have both a home authority and a primary authority. We do not want there to be unnecessary duplication and think that this is something BRE should look into further.

### **3 CONSULTATION QUESTIONS AND REPLIES ON REGULATORY SANCTIONS**

- 3.1 Question 16: *Are the lists contained in Schedules 3 and 4, and Clause 35(3) accurate and are there any omissions?*
- 3.2 The OFT is listed in Schedule 3 and is content that the alternative sanctions, should the OFT seek them, would be applicable to any offence under any legislation it enforces.
- 3.3 Please see our answer to question 11.
- 3.4 Question 17: *a) is the mechanism for awarding powers appropriate? b) are there other options or processes you would like to suggest?*
- 3.5 The OFT supports the objective behind the proposal for a selective approach to the granting of powers - to encourage adoption of and adherence to the principles of good enforcement and Macrory's penalties principles, particularly among enforcers who enjoy enhanced sanctioning flexibility. However the process as envisaged in the draft Bill seems likely to give rise to certain practical problems. Where regulators share enforcement powers and duties, such as the OFT and Trading Standards Services in relation to the Consumer Protection from Unfair Trading Practices Regulations 2007, for example, it is highly desirable, if at all possible for the enhanced toolkit to be awarded to all enforcement partners, preferably at the same time, otherwise enforcement decisions may be distorted and traders may face different regulatory tools for the same behaviour depending on where in the country the trader operates. There is a risk of conflict here between two different better regulation objectives – the appropriate use of sanctions, and consistency of enforcement.
- 3.6 One way forward here may be to ensure any selective grant of enhanced sanctioning powers is structured on a carefully-considered basis clearly laid out in guidance. In a context in which certain shared powers are often exercised more fully by one enforcer or group of enforcers than others, an acceptable approach may be to identify an enforcer or group

of enforcers who can be treated as piloting the use of the new toolkit ahead of others. But it would need to be clear that any resultant inconsistency was intended to be temporary and part of a staged roll-out.

- 3.7 Question 18: *Do you believe that there should be a process to withdraw or suspend powers? If so, what triggers do you believe could be used as a decision basis for withdrawing or suspending powers?*
- 3.8 If such a process were to be a routine or easily-used part of the structure of the legislation, it could well have potential to severely undermine the process of spreading use of flexible powers in a consistent way, and the authority and effectiveness of affected regulators.
- 3.9 Existing safeguards in the form of judicial review and/or abuse of process claims provide both reputational and financial disincentives against excessive or inappropriate use of powers by regulators. There may be scope to strengthen these safeguards if necessary. Other less adversarial mechanisms for spreading good practice can also be used to the same effect. For example LBRO could look at this. An alternative is the strengthening of regulatory partnership and leadership in areas of common interest that is being jointly pioneered by the OFT and Local Authority Trading Standards Services. The OFT believes mechanisms such as these provide a better means of ensuring proper use of enhanced sanctioning powers. A process to withdraw enhanced powers should, if it exists at all, be a reserve power designed for use only in the most exceptional cases.
- 3.10 Question 19: *Do you feel that the balance of safeguards and appeals is appropriate to this process?*
- 3.11 Yes, however, it is noted that the effect of the penalties is that the 'defaulter may not at any time be convicted of the relevant offence in respect of the act or omission'. Clarity is needed as to how far this principle may extend. The OFT does not object to the principle if it is restricted in its effect to avoiding repeat prosecutions. But we think it is clearly undesirable to go further, such that that where one enforcer has

used any of the remedies proposed no other enforcer can use any powers it has in respect of the same conduct. This particularly applies as regards the use of civil injunctive powers, whose purpose is to restrain future conduct as opposed to penalising past offences. The two kinds of penalty may well be complementary rather than involving any sort of 'double jeopardy', and it may be entirely appropriate for them to be used alongside each other. This would mainly tend to arise where an injunction was obtained to ensure non-repetition of an offence that has been the subject of a conviction, but in our view there need be no bar against imposition (whether by the same or another enforcer) of a retrospective penalty where an injunction has been obtained.

3.12 Question 20: *Is the procedure for issuing Discretionary Requirements appropriate for all types of regulatory non-compliance? If not, is there another way of issuing Discretionary Requirements and, if so, under what circumstances?*

3.13 We do have a concern about cases of urgency. Procedures should be such as to allow these to be addressed as speedily as possible. But we do not propose cutting out any of the steps currently laid out in the Bill. Rather, we would suggest provision for some stages in the procedure to be missed in cases where immediate action is necessary. For example, it may be appropriate for an enforcer to be able to omit the prior notice stage in the process where immediate compliance is required to put a stop to further consumer detriment.

3.14 Question 21: *Do you agree with the proposed enforcement of Discretionary Requirements?*

3.15 The OFT thinks these proposals are acceptable.

3.16 Question 22: *a) Should all Discretionary Requirements be enforceable by criminal prosecution for the original offence b) Do you agree that breach of a discretionary requirement should not be in itself a criminal offence?*

3.17 No to a) - Our view is that, under the proposals as currently drafted, if a trader engages in activity that could potentially be dealt with under Part 8 of the Enterprise Act or prosecuted as an offence, the incentives the

Macrory toolkit provides may lead enforcers down the criminal route (see below on the relationship of the proposals to civil enforcement). The likely tendency of these proposals to increase the number of prosecutions rather than reduce them is, in general, a concern for the OFT. This concern would be alleviated if breach of a Discretionary Requirement would entitle the regulator to take enforcement action for the original breach – being either civil or criminal as appropriate. If, in a case that would have been suitable for civil enforcement, where a Discretionary Requirement is imposed and then breached, Discretionary Requirements are enforceable only by criminal proceedings, the enforcer may have no option but to prosecute, yet this might not be proportionate.

- 3.18 In relation to b) we say Yes, because there is the risk that if breach of a Discretionary Requirement were made a criminal offence this would lead to regulatory subjects resisting the use of this sanction. The OFT will always seek to reach agreement with those against whom action is taken, in the first instance, as acting consensually usually leads to greater compliance. We would not wish obstacles to be placed in the way of agreed acceptance of Discretionary Requirements.
- 3.19 Question 23: *Do you agree that there should be stricter tests for the issue of Cessation notices?*
- 3.20 If the tests for issue of Cessation notices are too stringent then it may be more difficult for regulators to apply them to cases where quick and immediate action is required to minimise consumer detriment. The OFT considers that controlling access to the new regulatory toolkit, and the application of the principles of good regulation supported by the Regulatory Compliance Code, are adequate ways to ensure businesses are protected from inappropriate regulation, and we do not favour additional safeguards that would tend to undermine the usefulness of the new sanctions.
- 3.21 In the Bill, only Temporary Cessation Notices would be available in respect of the breaches of consumer law. Permanent Cessation Notices are only available if certain criteria are present and the interests of

consumers, we note, is not one of them. It is not clear why one type of notice can be used in respect of consumer interests and not the other. It would be more useful if both types of Notice were available in respect of risks to consumer interests, and the OFT would prefer a single notice which remained in force until such a time as compliance is achieved.

3.22 Question 24: *Do you agree with the criteria for Temporary Cessation Notices (.....or consumer interests)?*

3.23 Yes. In relation to these sanctions consumer interests are a relevant factor to consider before imposing them.

3.24 Question 25: *Should there be further criteria in the temporary cessation notice test? If so, could you suggest further criteria?*

3.25 Yes, where the defaulter has been repeatedly warned. This would support the use of warnings as an informal and non-burdensome enforcement tool.

3.26 Question 26: *(for Regulators) would temporary or permanent cessation notices be a power that you would use? Please give examples of how you would use them?*

3.27 Yes. In some of the OFT's 'scams' cases the ability to issue Cessation Notices would be a useful means of bringing a stop to offending activities quickly where that is essential to protect consumers – assuming, of course, there were strong consequences for failing to adhere to a cessation notice. In most of these cases those responsible for such scams are unfortunately able under current provisions to carry on the offending activity even after they have been informed by the OFT that their activity breaches consumer legislation, continuing to make money in the time it takes for a matter to be heard in court. In many cases rogue traders are well aware that they can do this, and plan their activities accordingly. The ability to issue a cessation notice quickly offers enforcers the prospect of effectively shutting down such scams promptly and thus preventing further consumer detriment.

- 3.28 Question 27: *Given the safeguards available before imposing a permanent or temporary cessation notice, is it reasonable to have a compensation scheme?*
- 3.29 There are existing avenues for pursuing a claim against a public authority who has misused its powers occasioning loss. A compensation scheme which took things much further would be likely to encourage claims which would hamper (and might well be designed to hamper) the regulator's ability to perform its functions. As stated above, the OFT thinks that controlling access to the new regulatory toolkit, and the application of the principles of good regulation supported by the Regulatory Compliance Code, are adequate ways to ensure businesses are protected from inappropriate regulation, and we do not favour additional safeguards that would tend to undermine the usefulness of the new sanctions.
- 3.30 Question 28: *Are preventative notices a necessary addition to the regulatory sanctioning toolkit? Please give reasons for your answer.*
- 3.31 We do not consider that preventative notices are a necessary addition. There is nothing currently stopping a public authority/regulator from writing to a trader or business it thinks is in danger of breaching legislation alerting them to that fact. The OFT makes extensive use of warning letters (see above, answer to Q 25). A positive requirement on regulators to do so may lead to the expectation or reliance on regulators to do so rather than businesses taking appropriate steps to ensure compliance.
- 3.32 Question 29: *Do you think that the test proposed is appropriate for preventative notices? If not, please give reasons for your answers*
- 3.33 See answer above.
- 3.34 Question 30: *Do you think there should be further safeguards around the use of preventative notices? If so, please provide further details.*
- 3.35 See answer to Question 28 above.

- 3.36 Question 31: *Do you think that publication of Enforcement Undertakings on a regulator's website is an appropriate step?*
- 3.37 Yes, many regulators including the OFT currently publish undertakings received. This is an important in achieving regulatory accountability and effectiveness. It also enhances and reinforces the sharing of information between enforcers, which tends to reduce scope for regulatory inconsistency and duplication.
- 3.38 Regulators would benefit from express provision in the Bill to publication wherever appropriate. This would tend to reduce the scope for arguments we currently have when we try and publicise undertakings. It is our experience that those giving undertakings will often seek to include confidentiality as a condition for giving the undertakings. Secrecy in relation to undertakings severely undermines their value in terms of ensuring the accountability of the regulator and its ability to learn of any breaches of undertaking encountered by the public, other businesses, or fellow enforcers. Express provision in the Bill as to publication would assist regulators in resisting attempts to secure confidentiality.
- 3.39 We think it is appropriate to publicise undertakings on some occasions more widely than just on the website, for instance via news releases. This enhances our ability to monitor compliance – unless the public and other enforcers are aware of the existence of the undertakings, it is impossible to monitor compliance without an intrusive inspection regime and disproportionate resource commitments.
- 3.40 Question 32: *Do you think that this could be tied with certificate of Enforcement Undertakings by also publishing the fact that the Enforcement undertakings have been successfully completed?*
- 3.41 The OFT is in favour of the principle of giving positive publicity to those who give and comply with undertakings. We commonly do this using news releases. However we have concerns about both certificates of Enforcement Undertakings and publication.
- 3.42 This proposal seems to us to have relevance only where undertakings require specific steps to be verifiably taken by a particular date, for

example, to have processes set up for handling complaints or stop carrying out certain activities by a certain date. But undertakings are not necessarily so specific. Undertakings given to the OFT often simply require the trader in future not engage in an illegal activity. In these case, it is not appropriate for the undertaking to be in any sense time-bound, and there is no point at which the giver of the undertaking can appropriately be said to have finished satisfying the requirements embodied in the undertaking.

- 3.43 There is also potentially a risk that certificates could be treated as conferring a guarantee that the trader is in compliance with the law when they warrant only that the trader has taken certain steps which tend to support compliance. Consumers or traders would tend to blame regulators if newly adopted and apparently 'certified' practices are still found wanting.
- 3.44 Question 33: *Are you satisfied with the proposed approach of allowing Voluntary Undertakings to be offered with a VMP?*
- 3.45 Yes, as this may secure more effective compliance than simply asking companies to pay a fine which can be easily absorbed in running costs and therefore, not have the desired impact. It would also be useful to have flexibility within that alternative sanction given the potential for large sums to be levied.
- 3.46 Question 34: *(a) would the financial implications to a regulators' enforcement budget be a significant factor in deciding if a regulator would want to use these alternative sanctions?*
- 3.47 Yes, there are additional administrative resource implications in setting up and operating the sanctions, such as those needed to cater for the new appeal procedures and schemes as well as the additional monitoring requirements. These would necessarily be a significant factor in any decision as to cases in which to use the new sanctions, though in principle the OFT would not expect to rule out use of these sanctions on resource grounds.

3.48 *(b) Would the recovery of costs for administering sanctions mitigate this?*

3.49 Yes, it would but that is not necessarily the answer since rogue traders often do not pay up and regulators find themselves having to spend even more chasing them for payment or having to write it off such costs eventually. The OFT would in most cases, in practice, probably not pursue costs. But on the whole the ability to recover costs is preferable to a total bar on recovering such costs. The OFT therefore believes it would be useful to have provision as to costs recovery set out in the Bill.

3.50 *Question 35: Are the other guidance documents that should also be published such as guidance on prosecution?*

In our view, it would be useful for enforcers to be given guidance on certain aspects of the proposals, namely:

- the test for applying the Temporary Cessation Notice sanction would also be useful - for example, what would amount to 'significant risks' as opposed to serious risk
- the standard of proof required for the enforcer to be 'satisfied' that an offence has been committed so as to be able to impose a monetary penalty, in circumstances where it is the court who ultimately decides whether a breach has occurred (that is, in the absence of a conviction in court)
- on whether Enforcement Undertakings are intended to apply in respect of civil breaches as implied in the consultation document at paragraph 9.3 – 'They are an alternative option to pursuing enforcement action by instituting (civil or criminal) legal proceedings.'

## **4 ADDITIONAL OBSERVATIONS ON REGULATORY SANCTIONS**

### **Relationship of the proposals to civil enforcement**

- 4.1 In relation to consumer matters the OFT is currently mainly a civil enforcer operating particular under Part 8 of the Enterprise Act 2002 8 (Pt 8 EA02). This allows OFT to seek injunctions against breaches of law that threaten harm to the collective interests of UK consumers. A large number of consumer protection laws do not involve criminal offences but are enforceable via this civil injunctive route. Examples are breaches of the Unfair Terms in Consumer Contracts Regulations 1999, and legislation dealing with package holidays, distance selling, doorstep selling, and more. These powers are shared with other enforcers such as Local Authority Trading Standards Services, for whom, however, they are not as for the OFT the main available enforcement tool.
- 4.2 The OFT has used its civil injunctive powers extensively and has sought to encourage and support their use by enforcement partners. Civil enforcement as compared with prosecution has significant advantages, in terms of better regulation, in many cases. However, in common with other current general enforcement regimes, civil and criminal, the OFT's injunctive powers do not confer the flexibility to select between different sanctioning approaches which is the distinctive and innovative characteristic of the Macrory recommendations.
- 4.3 The proposals would, if adopted, allow the introduction of major improvements in dealing with cases that would previously have been pursued by prosecution, but they do not offer the advantages of flexibility in addressing certain other classes of case dealt with via the civil injunctive route. These are often cases whose nature makes them inherently inappropriate for the use of criminal procedure, for instance cases involving unfair contract terms.
- 4.4 By attaching the expanded toolkit of sanctions to criminal offences only, there is a major risk that the new legislation will serve to perpetuate rather than remove an anomaly in sanctioning singled out for criticism by Macrory, which is an excessive bias towards the use of criminal process

in enforcement. The likelihood is that, wherever tackling non-compliance could be pursued either as a civil breach or criminal offence, it will be increasingly pursued via the criminal route, in order to ensure access to the full range of alternative sanctions. One obvious drawback of this will inevitably be the increased administrative burden (for both enforcers and regulatory subjects) of preparing cases from the first in such a way that, if necessary, they can be presented so as to meet the exacting and costly requirements of a criminal prosecution.

- 4.5 This is particularly significant for the OFT and others in view of the impending introduction of the Consumer Protection from Unfair Trading Practices Regulations 2007. The OFT, together with Local Authority Trading Standards Services, will be empowered to take either criminal or civil enforcement action in respect of the large majority of breaches of these Regulations from April 2008. The proposals in the draft Bill will, however, mean that when enforcers gain access to alternatives to criminal sanctions, there will be greater incentive to go down the criminal prosecution route to secure compliance. This would be unfortunate since the choice of civil or criminal enforcement should, as Macrory said, be based on the nature and impact of the unlawful activity in question, taking a case by case approach, against the backdrop of a clear enforcement policy.
- 4.6 We anticipate that the OFT will wish to seek access to proposed new sanctions. Under the proposals as drafted, these would be available only in relation to criminal offences. The OFT will be able to prosecute under the proposed Consumer Protection from Unfair Trading Practices Regulations, but there are a number of administrative sanctions within the Bill that the OFT would welcome as alternatives to any of its existing and proposed sanctions.
- 4.7 An example of the kind of case in which the OFT may wish to use certain of the new sanctions could be where misleading advertisements are being published. A Cessation Notice could be issued to stop further publication immediately thereby minimising consumer detriment. Likewise Compliance and Restoration Notices would be useful to have as alternative sanctions provided that these Notices take effect immediately

and remain effective until resolution of any appeal. Restoration Notices could be used to make businesses give back gains acquired by misleading consumers or else make contributions in ways which would benefit consumers.

### **Enforcement Undertakings**

4.8 The OFT broadly supports the proposal for Enforcement Undertakings, but would strongly favour proposals more closely modelled on the concept of Enforceable Undertakings as envisaged in the Macrory Report. The proposals in the draft Bill depart from Macrory's recommendations in that Enforcement undertakings are not enforceable in their own right. The OFT has extensive experience of non-enforceable undertakings, under Part 8 of the Enterprise Act. This indicates that in many cases the enforceable model would have major advantages.

- There would be a stronger incentive for defaulters to adhere to what was negotiated. This would be the case whatever the final decision on whether the sanction for breach of undertaking should be a more stringent order being imposed by the court, or prosecution.
- The enforcement agency would be able to deal swiftly and efficiently with breaches of undertaking. Where action is taken over breach of a non-enforceable undertaking the enforcer must prove the case which led to it being given, not merely that it has been breached. In cases involving expert evidence, this is frequently extremely slow and costly. It is also unnecessary to the extent that the business, in giving an undertaking, can fairly be presumed to have acknowledged the existence of a case to answer.

4.9 We recognise, of course, that if undertakings are enforceable (particularly by prosecution), and/or if they effectively involve the making of implied admissions, traders may be less willing to agree to give them. We are not suggesting that enforcers should lose the ability to accept non-enforceable undertakings, which has the potential to remain a useful tool in its own right.